

ARUL BALASINGAM

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v.

AMPANG PUTERI SPECIALIST HOSPITAL SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR

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PRASAD SANDOSHAM ABRAHAM J

[ORIGINATING SUMMONS NO: 24NCVC-1130-05/2012]

28 JUNE 2012

ARBITRATION: *Agreement - Referral of dispute to arbitration - Termination of plaintiff as consultant anesthetist - Whether there was proper inquiry or investigation by defendant's Hospital Clinical Governance Committee - Whether there were bona fide serious issues raised - Whether justiciable by way of arbitration - Order sought to stay the effect of notice of termination pending arbitration - Whether there were matters a proposed arbitrator could deal with at appropriate time - Arbitration Act 2005, s. 18*

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The plaintiff was a consultant anesthetist. Pursuant to a consultant agreement dated 28 March 1995, the plaintiff joined the defendant which had just opened its hospital and signed a resident consultant's agreement governing the relationship between the parties. The plaintiff, during his tenure with the defendant, carried out duties and took on responsibilities that was testament to the defendant's confidence in the plaintiff's work. On 31 January 2012, the plaintiff was handed a letter from the Deputy Medical Director of the defendant, ('Dato Wahab') seeking an explanation of "alleged unusual procedure" in the operating theatres. It was alleged that the plaintiff had covered two operations at one time and the blood tests apparently relied on were inaccurate. On 16 February 2012, in a Medical Advisory Committee meeting, the plaintiff's matter was brought up in the presence of the plaintiff. The plaintiff contended that no notice of the same was given to him of this and Dato Wahab proceeded to question the plaintiff on the allegations against the plaintiff. Then on 8 March 2012, the plaintiff was handed a letter of suspension. The plaintiff consulted his peers who were on the Medical Advisory Committee and on 10 March 2012 they issued a letter to the defendant denying any conclusion of falsification of documents *ie*, blood reports on the plaintiff's part. The plaintiff wrote to the defendant

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- A on 14 March 2012, pointing out the irregularities in the meeting of the Medical Advisory Committee meeting. The Board of Management Committee met on 26 March 2012. The plaintiff alleged that he was not allowed to call witnesses nor was the plaintiff allowed representation. On 5 April 2012, the plaintiff was
- B handed a letter of termination. The plaintiff then wrote to the defendant to have the matter referred to arbitration. The plaintiff also appealed to the Board of Directors. However, on 4 May 2012, the plaintiff was handed a letter rejecting the plaintiff's appeal and was given a fresh notice of termination. The issues
- C that arose were (i) whether there were grounds in law/or in fact to substantiate the termination; (ii) whether there were specific breaches of the resident consultant agreement and the medical by laws; (iii) whether there was no proper inquiry or investigation by the defendant's Hospital Clinic Governance Committee as required
- D by the medical by laws.

Held (allowing plaintiff's application):

- E (1) There was evidence to suggest that members of the Medical Advisory Committee did not conclude there was falsification of the records by the plaintiff. Further, the plaintiff's explanations seem to point to a shortcoming in the regime of blood tests being kept at the defendant's hospital which apparently went online after the incident. Surely all these facts would have to
- F be investigated and evaluated fully before a finding could be reached as to whether the plaintiff was in breach of the resident's consultant agreement and medical by laws. The plaintiff had presented the facts that disclosed *bona fide* serious issues to be tried without going into the merits of the same.
- G The serious issues were justiciable by way of arbitration. These were matters that the proposed arbitrator could deal with at the appropriate time (s. 18 of the Arbitration Act 2005). Therefore, the matter should be referred to arbitration. (paras 8-9 & 11)
- H (2) The order sought merely stays the effect of the notice of termination dated 4 May 2012 pending arbitration. As far as the defendant was concerned, it was just awaiting for the matter to be arbitrated. The plaintiff, on the other hand, was
- I required to move his clinic out of the hospital under a shroud of serious allegations that touched upon the core of his professional integrity and competence as a specialist

anesthetist. No amount of damages to be subsequently awarded, could remedy the irreparable damage to the reputation of the plaintiff, bearing in mind the lack of corroborative evidence on the part of the Medical Advisory Committee. (paras 13 & 14)

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Case(s) referred to:

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Fiona Trust & Holding Corporation & Others v. Privalov & Others [2007] UKHL 40 (*refd*)

Rimbunan Hijau Sdn Bhd v. Sarawak Plywood (M) Sdn Bhd [1985] 1 CLJ 424; [1985] CLJ (Rep) 275 FC (*refd*)

Thye Hin Enterprises Sdn Bhd v. Daimlerchrysler Malaysia Sdn Bhd [2004] 3 CLJ 591 CA (*refd*)

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Legislation referred to:

Arbitration Act 2005, s. 18(1)

Other source(s) referred to:

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Sundra Rajoo WSW Davidson, *Arbitration Act 2005 UNCITRAL Model Law as applied in Malaysia*, p 84-88

For the plaintiff - Darryl Goon (M Vinoben with him); M/s Raja Darryl & Loh

For the defendant - M Yonoesswary Singam (Jagjit Kaur Gill with him); M/s Zainal Abidin & Co

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Reported by Suhainah Wahiduddin

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JUDGMENT

Prasad Sandosham Abraham J:

[1] Originally the court was scheduled to hear encl. 3, however both counsels before me agreed that as the issues and facts were essentially the same it would be more prudent to deal with encl. 1 and with the consent of counsel the court so proceeded. I granted an order in terms of encl. 1 (as amended) and the defendant have appealed against my decision and my grounds of judgment now follow.

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Factual Matrix of the Case

[2] These facts are found essentially in encl. 2, the affidavit of the plaintiff in support of encl. 1. In 1995 pursuant to a consultant agreement dated 28 March 1995, the plaintiff joined

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- A the defendant which had just opened its hospital. The plaintiff was a consultant anesthetist and had impressive credentials in terms of work experience before the plaintiff joined the defendant and subsequently the plaintiff signed a resident consultant's agreement (AB2 encl. 2) which governed the relationship between the parties.
- B (see para. 8 encl. 2). The plaintiff during his seventeen years tenure with the defendant, carried out duties and took on responsibilities that was testament to the defendant's confidence in the plaintiff's work. (see para. 9 and 10 encl. 2).
- C [3] On 31 January 2012 the plaintiff was handed a letter from the Deputy Medical Director of the defendant "Dato Wahab" seeking an explanation of "alleged unusual procedure" in the operating theatres and the plaintiff replied on 3 February 2012 explaining what had transpired. It was alleged the plaintiff was
- D covering two operations at one time and the blood tests apparently relied on was not accurate (see AB4 & AB5 encl. 2). The plaintiff again wrote to the said Dato' Wahab on 16 February 2012, on the matter (see AB6 encl. 2).
- E [4] Now on the same date, ie, 16 February 2012 in a Medical Advisory Committee meeting convened to discuss various issues the plaintiff's matter was brought up in the presence of the plaintiff. The plaintiff contends no notice of the same was given to him of this and the said Dato' Wahab proceeded to question
- F the plaintiff on the allegations against the plaintiff, but the plaintiff maintained his stand as per his letters to Dato' Wahab.
- G [5] Then on 8 March 2012 the plaintiff was handed by the defendant's General Manager a letter of suspension (AB7 encl. 2). What is important to note from this letter the findings are premised on the due deliberation of the Medical Advisory Committee and the complaints seem now focused on the inaccuracies/and or falsification of the blood reports. The relevant provisions of the Resident Consultant Agreement (AB2) were referred to. The plaintiff obviously irked by this notice consulted
- H his peers who were on the Medical Advisory Committee and who were present on 16 February 2012 and they on 10 March 2012 issued a letter to the defendant denying any conclusion of falsification of documents on the plaintiff's part (see AB10 encl. 2). There also appears to be an issue as to the authenticity of draft
- I minutes of this meeting.

[6] The plaintiff wrote to the defendant on 14 March, pointing out the irregularities in the meeting of the Medical Advisory Committee (see AB13 encl. 2). There was no direct response to the plaintiff's said letter but the defendant on 15 March 2012 wrote to the plaintiff to attend a Board of Management Committee meeting on 19 March 2012 (see AB14 encl. 2). The plaintiff was given the option to call internal witnesses if thought fit. As the plaintiff thought that it was too short notice, the plaintiff wrote to the defendant on 16 March (AB15 encl. 2) which also raised the plaintiff's challenge to the procedure being adopted by the defendant. The defendant did not specifically reply to the plaintiff's letter but by the defendant's letter dated 19 March 2012 the Board of Management Committee meeting was to be held on 26 March 2012 at 3pm (AB16 encl. 2) but in the meanwhile, the Medical Advisory Committee had recommended to the management that the plaintiff be suspended for two weeks, a position being challenged by the plaintiff.

[7] The Board of Management Committee met on 26 March 2012. The plaintiff alleges that he was not allowed to call witnesses nor was the plaintiff allowed representation. On 5 April 2012 the plaintiff was handed a letter of termination (AB18, encl. 2). The plaintiff had written to the defendant to have the matter referred to arbitration. The plaintiff also appealed to the Board of Directors *vide* letter dated 7 April 2002 (AB19, encl. 2). The defendant replied that a committee of review would be set up to consider the plaintiff's appeal (see AB20 encl. 2). The committee of review heard the plaintiff's appeal and on 4 May 2012, the plaintiff was handed a letter rejecting the plaintiff's appeal and a fresh notice of termination (2nd notice) issued (see AB14 encl. 2).

Serious Issues to be Tried

[8] *The Plaintiff Argues*

- (1) The 2nd notice of termination issued by the defendant to the plaintiff is invalid as there were no grounds in law and/or in fact to substantiate the termination. There is evidence to suggest that members of the Medical Advisory Committee did not conclude that there was falsification of the records by the plaintiff. Further, the plaintiff's explanations seem to point to a shortcoming in the regime of blood tests being kept at the

A defendant's hospital which apparently went online after the incident. Surely all these facts would have to be investigated and evaluated fully before a finding could be reached as to whether the plaintiff was in breach of the resident's consultant agreement and medical by laws.

B (2) The plaintiff also raised specific breaches of the resident consultant agreement (AB2), and the medical by laws.

C (3) There were no proper inquiry or investigation by the defendant's Hospital Clinical Governance Committee as required by the medical by laws.

D [9] I am satisfied the plaintiff have presented facts before me that disclose *bona fide* serious issues to be tried without going into the merits of the same. The serious issues are justiciable by way of arbitration. The defendant submits that cl. 10 of the Resident Committee Resident Consultant Agreement is exhaustive and preclude in this case, reference to arbitration. Counsel for the defendant argues the relevant clause for termination is cl. 10.2, which I now set out (AB2 p. 21 encl. 2).

E 10.2 Termination by the Company

F The Company shall have the right to terminate this Agreement by giving notice in writing of fourteen (14) days upon the happening of any one or more of the following events.

[10] Upon notice being issued the only other relevant clause is cl. 10.2.2.5 which I now set out:

G The Consultant shall have failed to carry out or commit a breach of any of the terms and conditions herein obtained.

H Then the Company, in consultation with Credentials Committee set up under the Medical Staff By-Laws, may (but shall not be obliged to) accept by way of compensation a sum of not more than Ringgit Malaysia Ten Thousand (RM10,000.00). Only as agreed liquidated damages for the waiver of such breach of the terms and conditions of this Agreement but the acceptance of such payment shall not operate as a waiver for any subsequent breaches.

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[11] So s. 19 of the said agreement does not apply as both parties have to be bound by the agreement that they have put pen to. At this stage without making any specific finding on this argument all these are matters that the proposed arbitrator can deal with at the appropriate time s. 18 of the Arbitration Act 2005 which I now set out particularly s. 18(1).

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18. Competence of arbitral tribunal to rule on its jurisdiction

- (1) the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

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Clearly provides for this. I refer to the commentary on the Arbitration Act 2005 UNCITRAL Model Law as applied in Malaysia Sundra Rajoo WSW Davidson pp. 84-88 and I quote from the learned authors in para. 18.6 and 18.7.

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- 18.6 Section 18(1) provides for the doctrine of 'Kampetenz-Kompetenz' which is taken from German terminology. The doctrine has two aspects. Firstly, it confirms to the arbitrators that they may decide on their jurisdiction without need for support from the Court. Secondly, it discourages the Court from determining the issue before the arbitral tribunal has decided it. The Court itself when seized prematurely with the issue of the arbitrator's jurisdiction would confine itself to find that an arbitration agreement exists and ability of one party to delay the proceedings by taking the matter to Court and claiming want of jurisdiction (see Malhotra, p. 630),

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Choices when challenged

- 18.7. Whenever there is a jurisdictional challenge, an arbitrator who can decide on his own jurisdiction has three alternative courses of action. First, he may determine that he has no jurisdiction at all particularly, where the lack of jurisdiction is evident, in which event the arbitral proceedings will terminate in the absence of a court order to the contrary. Secondly, he may determine that he has jurisdiction and issue an interim award, in which event either party or both parties may challenge the award in the manner provided for under the relevant legislation or rules and seek a pronouncement from a competent court or authority as to the jurisdictional issue. Finally, he may continue with the arbitration without adopting either of the courses above until stopped by an order from a competent court.

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A I concluded therefore the matter should be referred to arbitration.

[12] I also refer to the decision of the House of Lords in *Fiona Trust & Holding Corporation & Others v. Privalov & Others* reported in [2007] UKHL p. 40 where the House of Lords held:

- B (1) The time had come for a fresh start to be made to the construction of arbitration clauses. Such construction should start from the assumption that the parties, as rational businessmen, were likely to have intended any dispute arising out of the relationship into which they had entered or purported to enter to be decided by the same tribunal.
- C The clause should be construed in accordance with that presumption unless the language made it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. Clause 41 of Shelltime 4 contained nothing to exclude disputes about the validity of the contract, whether
- D on the grounds that it was procured by fraud, bribery, misrepresentation or anything else. Accordingly it was apt to cover the question of whether the contract was procured by bribery (see [13]-1151 [21], [22], [31], [36], [37], [38], below); *AT & T Technologies Inc v. Communications Workers of America* [1986] 475 US 643, *Threlkeld & Co Inc v. Metallgesellschaft Ltd (London)* [1991] 923 F 2d 245 and *Comandate Marine Corp v. Pan Australia Shipping Pty Ltd* [2006] FCAFC 192 considered.
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- F (2) Section 7 of the 1996 Act was to be interpreted so that the main agreement and the arbitration agreement had to be treated as having been separately concluded and the arbitration agreement could be invalidated only on a ground which related to the arbitration agreement and was not merely a consequence of the invalidity of the main agreement. The doctrine of separability required direct
- G impeachment of the arbitration agreement before it could be set aside. In the instant case there was an inference that the agent acting for the owners had been bribed to consent to the main agreement, but that did not show that he had been bribed to enter into the arbitration agreement. Accordingly
- H the arbitration agreement had to be given effect and the charterers were entitled to a stay of proceedings. The appeal would be therefore be dismissed (see [16]-[19], [21], [22], [32], [35], [36], [37], [38], below); *Prima Paint Corp v. Flood & Conklin Mfg Co* [1967] 388 US 395 considered.

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and see also:

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[13] In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore LJ remarked, at [17]: '[i]f any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so.'

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[14] This appears to be the approach adopted in Germany: see Schlosser 'The Decision of 27 February 1970 of the Federal Supreme Court of the Federal Republic of Germany (Bundesgerichtshof)' *Arbitration Int* 1990, 6(1) p 79:

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There is every reason to presume that reasonable parties will wish to have the relationships created by their contract and the claims arising there from, irrespective of whether their contract is effective or not, decided by the same tribunal and not by two different tribunals.

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[15] If one adopts this approach, the language of cl. 41 of Shelltime 4 contains nothing to exclude disputes about the validity of the contract, whether on the grounds that it was procured by fraud, bribery, misrepresentation or anything else. In my opinion it therefore applies to the present dispute.

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[13] I now turn to the justice of the case and whether granting the order sought out weighs the harm of refusing the same. The order sought merely stays the effect of the notice of termination dated 4 May 2012 pending arbitration. As far as the defendant is concerned it is just awaiting for the matter to be arbitrated. The plaintiff on the other hand is being required to move his clinic out of the hospital under a shroud of serious allegations that touch upon the core of his professional integrity and competence as a specialist anesthetist and the first with the defendant.

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[14] In my view no amount of damages to be subsequently awarded, can remedy the irreparable damage to the reputation of the plaintiff bearing in mind the lack of corroborative evidence on the part of the Medical Advisory Committee. The sole test for the

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A court is *status quo* and I refer to the decision of the Supreme Court in *Rimbunan Hijau Sdn Bhd v. Sarawak Plywood (M) Sdn Bhd* reported in [1985] 1 CLJ 424; [1985] CLJ (Rep) 275 at p. 275 where it was held.

B The main consideration is whether the *status quo* ought to be preserved and in considering this the court must determine the matter on the balance of convenience.

This was a case involving the Arbitration Act 1952 and an injunction was being sought.

C [15] I refer to the decision of the Court of Appeal in *Thye Hin Enterprises Sdn Bhd v. Daimlerchrysler Malaysia Sdn Bhd* [2004] 3 CLJ 591 and to the judgment of His Lordship Mohd Ghazali Yusoff JCA at p. 599 and I quote:

D It would seem that the KLRCA rules recognize the need for court intervention in certain situations, particularly in emergency cases, and have made suitable provisions in this connection. Court intervention, by way of ordering interim measures of protection, is essential in urgent situations particularly when

E granting relief is beyond the jurisdiction of the arbitral tribunal or **where the arbitral tribunal has not yet been constituted.** The court in *Third Chandris Shipping Corp v. Unimarine SA* [1979] QB 645 observed that it only takes a telephone call or telex message which could, within seconds of the service of the writ, put all liquid assets out of reach of the creditor. The object of

F interim measures of protection is to support the arbitration by making it effective. This is to say, the court may intervene in support of arbitration by granting interlocutory injunctions. In this connection, in *Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd* [1993] 1 All ER 664, speaking for the House of

G Lords, Lord Mustill candidly stated that ‘none of the terms of the Arbitration Act of 1950, apply to foreign arbitrations and that since these include s. 12(6), the power conferred by s. 12(6)(h) to grant an interim injunction is not available to the court in respect of foreign arbitrations such as the present’. He then authoritatively stated the law: ‘... the purpose of interim measures

H of protection ... is not to encroach on the procedural powers of the arbitrators but to reinforce them, and to render more effective the decision at which the arbitrators will ultimately arrive on the substance of the dispute. Provided that this and no more is what

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such measures aim to do, there is nothing in them contrary to the spirit of international arbitration.' Their Lordships then upheld the proposition that interlocutory measures could be taken against a defendant within the jurisdiction of the English courts to protect the foreign arbitration.

[16] For the aforesaid reasons I allowed the plaintiff's application in encl. 1 on terms.

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